No. SC85809

IN THE
SUPREME COURT OF MISSOURI

PURLER-CANNON-SCHULTE, INC., et al.,

Appellants,

v.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, et al.,

Respondents.

Appeal from the St. Charles County Circuit Court
The Honorable Nancy L. Schneider, Circuit Judge

RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

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STATEMENT OF FACTS

Course of Proceedings in the Circuit Court Below. Purler-Cannon-Schulte, Inc., and Karsten Equipment Co. (Plaintiffs) filed their Petition for Declaratory Judgment against the Missouri Department of Labor and Industrial Relations (Department) and the City of St. Charles (City) on April 18, 2000. Legal File (LF) 8. Plaintiffs are St. Louis area construction contractors that engage in the installation and repair of water and sewer piping systems. LF 9. They sought a declaration that the Department unlawfully applies the occupational title of Pipe Fitter to the non-mechanized activities involved in the installation of outdoor pipelines, other than the actual joining of pipes, on public construction projects. LF 8-24. Plaintiffs also requested a declaration that they did not owe penalties to the City that had been assessed by the Department based on the Department's determination that many of Plaintiffs' employees on projects Plaintiffs had already performed for the City should have been paid the prevailing wage for the occupational title of Pipe Fitter. LF 8-24. The Department answered and filed counterclaims against Plaintiffs for payment of penalties assessed by the Department on four projects on which Plaintiffs had not paid their workers under the occupational title of Pipe Fitter for the workers' activities related to the installation of pipe. LF 30-50.

On January 15, 2003, following the filing of cross motions for summary judgment by Plaintiffs and the Department, the circuit court concluded that the Department's application of the occupational title of Pipe Fitter was lawful and granted summary

judgment in the Department's favor on all Plaintiffs' claims against it. LF 785-98. The court found the Department was entitled to continue its pursuit of its counterclaims for penalties. LF 798.

After the court's judgment, the Plaintiffs and the Department entered a contingent settlement of the remaining claims and, on April 8, 2003, the court entered final judgment. LF 816-824. Plaintiffs filed their notice of appeal on April 25, 2003. LF 830.

Following briefing and argument, the Missouri Court of Appeals, Eastern District, affirmed the decision of the circuit court on January 27, 2004. In its decision, the court also transferred this case to the Supreme Court because it presents questions of general interest and importance.

Facts. The Department has consistently interpreted the Prevailing Wage Law to require payment of the prevailing wage for the occupational title (or, previous to the Occupational Title Rule, the classification) of Pipe Fitter to workers who fabricate, install, or repair pressurized piping systems. LF 715, 472-73 (Depo. pp. 48-50). Specifically, this consistent interpretation of the Law is the one that was applied to the work of the four projects that were the subject of the Department's counterclaim in this case. LF 715.

The Occupational Title Rule, 8 C.S.R. 30-3.060, is a regulation specifically setting out what construction tasks are similar in character to other construction tasks by assigning these tasks to particular categories of work. LF 712. Before the implementation of this Rule, the Department's Annual Wage Orders, issued by the Department's Division of Labor Standards

(Division), contained descriptions of work that it considered as falling within certain occupational classifications. LF 712. Among these occupational classifications for which descriptions were provided were the classifications of General Laborer - Heavy Construction and Skilled Laborer - Heavy Construction. LF 712. Comparable descriptions for these two occupational classifications were also provided in the project specific wage determinations that the Division issued before it began issuing Annual Wage Orders. LF 712-13. No description was given in either the Annual Wage Orders or the project specific wage determinations of the work included within the occupational classification of Pipe Fitter. LF 713.

The description of the tasks included within the occupational classification of General Laborer - Heavy Construction provided in the project specific wage determinations and in the Annual Wage Orders issued before implementation of the Occupational Title Rule included: "all work in connection with sewer, water, gasoline, oil, drainage pipe, conduit pipe, tile and duct lines and all other pipe lines." LF 713. The descriptions of the tasks included within the occupational classifications of General Laborer - Heavy Construction and Skilled Laborer - Heavy Construction provided in the project specific wage determinations and in the Annual Wage Orders issued before implementation of the Occupational Title Rule were meant only to differentiate between different kinds of work done by different categories of Laborer, not to differentiate between the work of the classifications Laborer and Pipe Fitter. LF 713.

As indicated by the purpose of the descriptions related to the classifications of Laborer, the meaning of the language "all work in connection with" the various kinds of pipe meant "all work *that would typically be done by a Laborer* performed in connection with" the various kinds of pipe. LF 713 (emphasis in affidavit). In other words, the work typically performed by a Laborer in connection with pipe projects came within the classification of General Laborer -

Heavy Construction instead of within the classification of Skilled Laborer - Heavy Construction (or any other classification of Laborer for that matter). LF 713. Work typically done by a Laborer performed in connection with a pipe project, and that would be included within the classification of General Laborer - Heavy Construction, includes unloading the pipe by hand into a stockpile, digging a trench by hand, and filling the trench in by hand. LF 713. These sorts of tasks done in relation to pipe work are the sorts of tasks that can be done in relation to either pressurized or non-pressurized pipe. LF 713-14. The description of the work of General Laborer - Heavy Construction was not intended to expand the work of the occupational classification of Laborer to include work related to the actual fabrication, installation, and repair of pressurized pipe. LF 714.

The work involved in installation of a pressurized piping system is not work of a similar character to that involved in installation of a non-pressurized piping system. LF 714. There are differences in the tools, tasks, and techniques involved. LF 714. This is reflected in decisions of the Labor and Industrial Relations Commission. LF 714, 218, 222.

There are occasions when the prevailing wage in a county for the occupational title of Laborer is higher than the prevailing wage in that county for the occupational title of Pipe Fitter. LF 714; Respondent's Supp. LF 6-7, 10-11. This means that, if Plaintiffs provided to the Department the wage information from their outdoor pipe projects on which they have employed Laborers at tasks within the occupational title of Pipe Fitter, their wage information could determine the prevailing wage rate for the occupational title of Pipe Fitter in a county. LF 714.

STANDARD OF REVIEW

The Court exercises an essentially *de novo* standard of review on appeals from summary judgments, and no deference is due a trial court's order of summary judgment. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993); Toumayan v. State Farm Gen. Ins. Co., 970 S.W.2d 822, 824 (Mo.App. 1998). Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mo.R.Civ. Proc. 74.04(c)(3). The Court grants the non-movant the benefit of "all reasonable inferences from the record." *Id.*

ARGUMENT I

A. Even if the application by the Department of Labor and Industrial Relations of the prevailing wage for the occupational title of Pipe Fitter to workers engaged in outdoor pipe projects constituted a change from its previous practice, any such change would not violate the Hancock Amendment because it is not a changed administrative practice that would result in "an increase in the level of any activity or service beyond that required by existing law" that would be inconsistent with the Hancock Amendment.

B. The application of the prevailing wage for the occupational title of Pipe Fitter to workers engaged in outdoor pipe projects by the Department of Labor and Industrial Relations does not violate the Hancock Amendment because this application is not a new position or practice of the Department.

[Response to Appellants' First Point.]

A. Hancock Amendment Does Not Apply to Any Change in Application of Occupational Classifications.

The portion of the Hancock Amendment relied on by Plaintiffs states as follows:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

MO. CONST. art. X, § 21. This prohibition of state imposition of unfunded mandates on local political bodies will apply here only if the Department has somehow required political

subdivisions to undertake a new or increased activity or service that, in turn, raises their expenses. Plaintiffs argue that the Department, in applying the Prevailing Wage Law, has changed its application of occupational classifications[1] with respect to outdoor pressurized pipe projects with the result that political subdivisions will face increased costs on such projects. But, as discussed in Part B of this Point, the Department has not changed its position. Plaintiffs' claim also fails for a more basic reason: even the change they inaccurately posit is not the sort of changed application of an administrative practice that would result in "an increase in the level of any activity or service beyond that required by existing law." Thus, the Hancock Amendment would not apply even if Plaintiffs were right.

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[1]The terms "occupational classification" and "occupational title" are essentially synonymous. They both refer to groupings of tasks considered by the Department to be work of a similar character. "Occupational classification" or just "classification" were the terms used before implementation of the Occupational Title Rule, while the term "occupational title" has been used since then. LF 467, 469 (Depo. 26-27, 34).

Prevailing Wage Law Background. Since 1957, the Prevailing Wage Law, §§ 290.210 to 290.340, RSMo 2000, has required that

> [n]ot less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed . . .shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works . . . .

§ 290.230.1. The Department of Labor and Industrial Relations (Department) is the agency charged with the responsibility of enforcing the Prevailing Wage Law. § 290.240.1.

Because prevailing wages are required to be paid for "work of a similar character," a determination about what work is similar in character to other work must be made before prevailing wages for each type of work can be determined. The Department makes these determinations now based on descriptions of various types of construction work set out in the Occupational Title Rule. *Associated Gen. Contractors v. Department of Labor and Indus. Rels.*,

898 S.W.2d 587 (Mo. App. 1995)8 C.S.R. 30-3.060(1). Despite identifying the titles by names that may be the same as those used by labor unions (such as Laborer and Pipe Fitter), any worker may do work included within the definition of any occupational title regardless of union affiliation (and regardless of whether the worker is a member of a union at all). Occupational titles could just as easily have been identified by numbers instead of names. The regulation does not affect *who* does the work; rather it explains how much workers must be paid when they do a certain type of work. *Branson R-IV School Dist. v. Labor and Indus. Rels. Comm'n*,

888 S.W.2d 717 (Mo. App. 1994) Even if the Department had changed its application of occupational classifications, as asserted by Plaintiffs, the Hancock Amendment was not designed to prohibit such a change in administrative practice. Plaintiffs here are attempting to force the "square peg" of the unfunded mandate prohibition of the Hancock Amendment into the "round hole" of their disagreement as to the Department's application of the Occupational Title Rule. Not only is the fit poor, but the attempt itself is untenable for several reasons.

First, Hancock's unfunded mandate prohibition serves only to protect local public bodies from actions of the state that impose new obligations on those bodies or that shift long-standing obligations from the state to those bodies. The prohibition was not enacted to protect private companies from increased costs. Many actions by the state or its agencies, like a change in application of occupational titles, might increase expenses of private businesses, which in turn will, when possible, pass the increased expense on to their public body customers. This does not, however, constitute a "mandate" of increased activities and costs by the state to those local public bodies.

Second, the prohibition of unfunded mandates applies only to state law changes that impose new activities or services on political subdivisions. Here, the political subdivisions' obligation under the Prevailing Wage Law is to require that contractors abide by that Law, and that requirement has not changed. Any new activity or service resulting in a change in application of the occupational titles is a new activity or service to be fulfilled by private contractors, not by local public bodies.

Third, the unfunded mandate prohibition also does not apply to any change in the application of occupational classifications because such changes do not require local public

bodies to pay any increase in costs. Local public bodies could avoid any increase in costs by declining to engage in new construction projects or by using their own employees, to whom the Prevailing Wage Law does not apply, to perform the construction work.

Fourth, the poor fit of the Plaintiffs' invocation of the Hancock Amendment's prohibition of unfunded mandates here is highlighted by the absurdity of the result of applying the limited remedies that are available under the Hancock Amendment. The only remedy that this Court can order for a violation of the prohibition of unfunded mandates is to relieve the local political body of the obligation to comply with the new mandate. In enforcing the Hancock Amendment in this case, this Court could at most relieve the local body's obligation to pay the contractor for any portion of the expense stemming from application of the Occupational Title Rule, but could do nothing to protect Plaintiffs or lower their costs. This absurd conclusion illustrates that Plaintiffs' unfunded mandate claim is ill-conceived.

Each of these points, in addition to the point that the Occupational Title Rule has already been adjudged sound under the Hancock Amendment, supports affirmance of the circuit court's grant of summary judgment in favor of the Department.

Occupational Title Rule has already been found consistent with Hancock Amendment. The court in *AGC* should not apply here because the "only constitutional question [in 898 S.W.2d at 594*AGC* does not control the answer to the Hancock challenge in this case because the decision in *AGC* indicated that future modifications in the Occupational Title Rule would not run afoul of the Hancock Amendment. The court discussed the process for modifying the definition of an occupational title in the context of its analysis of the Hancock Amendment argument without any hint that such a future modification would itself cause a violation of the

Hancock Amendment. : Changes in the occupational titles or their application do not necessarily result in any change in costs to political subdivisions. The occupational titles do not determine the prevailing wage rate. It is the actual wages paid in the various counties for work included within those occupational titles that determines the prevailing wage.

For example, even if the Department had changed its application of occupational titles as Plaintiffs contend by removing the work of installing pressurized pipe from the Laborer occupational title and adding that work to the Pipe Fitter occupational title, the prevailing wage rate for such work would not necessarily change. If Laborers typically install pressurized pipe in a county, the rate paid to Laborers can set the prevailing wage rate for the occupational title of Pipe Fitter. This will happen if the total number of hours worked by Laborers on pressurized pipe projects and other tasks set out in the Pipe Fitter occupational title is more than the total number of hours worked by Pipe Fitters at the other tasks set out in the occupational title of Pipe Fitter. It is the wages paid for particular work, not the status of the person doing the work that sets the prevailing wage. This method of determining the prevailing wage is mandated by the Prevailing Wage Law itself. *Branson,* 888 S.W.2d at 724. There are occasions when the prevailing wage in a county for the occupational title of Laborer has been higher than the prevailing wage in that county for the occupational title of Pipe Fitter. LF 714; Respondent's Supp. LF 6-7, 10-11. Moreover, even though the court in 898 S.W.2d at 594.

Any change in the application of occupational titles that might result in higher labor costs to contractors is no more a state imposed mandate on local public bodies than would be a change in workers' compensation laws or in minimum safety standards that results in increased contractor costs. These kinds of changes apply to private contractors and have, at most, only an incidental effect on public construction costs to public bodies. Such incidental effects are

insufficient to constitute a "mandate" of increased activities and costs by the state to those local public bodies.

Changes in occupational titles do not change any mandate local public bodies must comply with. Even if private costs to contractors go up if they pay workers engaged in pressurized pipe work under the occupational title of Pipe Fitter rather than under the occupational title of Laborer, any such increase in private costs does not add any new activity or service, or increase the level of any activity or service, that a public body must perform. Its duties remain unchanged under the Prevailing Wage Law. It still must include the requirement that prevailing wages be paid in its construction contracts. §§ 290.250, 290.320, 290.325. The public body is still not authorized to make final payment to a contractor until the contractor has provided an affidavit stating that it has fully complied with the requirements of the Prevailing Wage Law. § 290.290.2. It is also still the duty of the public body to take cognizance of all complaints and violations of the Prevailing Wage Law on its construction projects and to withhold from its payments under the construction contract all amounts due as a result of such violations. § *Division of Employment Sec. v. Taney County Dist. R-III,*

922 S.W.2d 391 (Mo. banc 1996)*Miller v. Director of Revenue*, 719 S.W.2d 787 (Mo. banc 1986)*Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982)*Boone County* had a collector, was directly responsible for paying the collector, and was statutorily obligated to employ a collector (*see* § 52.010, RSMo).

Changes in occupational titles do not require increased costs by political subdivisions. The Hancock Amendment prohibits only "a new or increased activity or service [that] is *required* of a political subdivision *by the State.*" St. Charles County v. Director of

Revenue, 961 S.W.2d 44, 49 (Mo. banc 1998) (emphasis added). Even assuming (1) the Department has changed its application of the occupational titles, (2) that this has resulted in an increase in the prevailing wage applicable to the work of installing pressurized pipe, (3) that this cost increase is passed on to political subdivisions in the form of higher project costs, and (4) that this higher project cost is deemed "a new or increased activity or service" on the part of the political subdivision, the increased cost to the political subdivision is still not required by the state. A political subdivision could avoid the increased costs by choosing not to go through with a contemplated construction project.[2] Or, because the Prevailing Wage Law does not apply to wages paid by political subdivisions to their own employees (City of Joplin v. Industrial Comm'n, 320 S.W.2d 687, 692 (Mo. banc 1959)), a political subdivision could also avoid the increase in costs by using its own employees to perform the desired work.[3] Thus, even if the

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[2]The Amicus Brief, at p. 15, states that a political subdivision cannot choose not to perform public works projects and gives the example of the necessity of the immediate action that a city must take in the event of a sewer or water line break. But the repair work necessary in this situation is maintenance work. *See* § 290.210(4) 290.210(4), RSMo. Maintenance work is not subject to the Prevailing Wage Law. § 290.230.1, RSMo.

[3]The Amicus Brief, at p. 15, states that not every political subdivision "has the luxury" of using its own employees and gives the example of a rural water district that has one, part time, clerical employee. But, if that rural district has the funding to contract

four assumptions noted above are accurate, the state is not mandating that a political subdivision engage in the activity whose costs have increased.

This is the reasoning followed by this Court in City of Jefferson v. Missouri Dep't of Natural Resources, 863 S.W.2d 844, 847-48 (Mo. banc 1993), in rejecting the contention of three Missouri cities that a new state law required them to join in financing solid waste management districts and that this violated the restrictions of the Hancock Amendment. The Court found that the statute did not mandate that any city become a member of a solid waste management district. "Rather, the statute is permissive and allows cities to join such districts if they choose to do so." *Id.* at *City of Jefferson* is misplaced. Plaintiffs first argue that this Court's subsequent decision in Missouri Mun. League v. State, 932 S.W.2d 400 (Mo. banc 1996) ("*MML*"), rejected the portion of the *MML* found the 932 S.W.2d at 403*City of Jefferson*.

The issue in *City of Jefferson* was whether the Hancock Amendment applied to a new state requirement that would raise costs to a public body only if it took some subsequent permissive activity or service, joining a solid waste management district in particular. As discussed in the cross motion, the Court found the Hancock Amendment did not apply in that situation because a public body would face increased costs only if it voluntarily chose an option that would raise those costs. 863 S.W.2d at 848.

Thus, the distinction between these two cases is not whether, theoretically, the service or activity at issue is discretionary or permissive in nature, but whether the public body has actually acted on its discretion and is engaging in the service or activity. The Hancock Amendment

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for pipe work that is needed, it must also have the funding to hire additional employees to do the work.

applies to an ongoing service or activity that a public body is engaged in regardless of whether it initially chose to do so voluntarily. The Amendment does not apply to a public service or activity that a public body may engage in, but has not yet chosen to do at the time of a state mandated increase in the level of that activity or service.

It is the *City of Jefferson* itself does not support the Department's position because the Court in that case actually held that the statute at issue did mandate an increase in an activity required of a public body and thereby met at least the first part of the constitutional test used in examining a state law for compliance with article X, § 21 of the Hancock Amendment. LF 728-29. Plaintiffs, however, confused two separate issues addressed by the Court in 863 S.W.2d at 848. On the other hand, the portion of the decision Plaintiffs referred to involved a separate provision of the statute. That provision required certain cities (and counties) to submit a solid waste management plan or to revise an existing plan. Because that provision of the statute implemented requirements instead of options, the Court concluded that that provision did require an increase in a current activity by public bodies. *Id.* The first part of the Even if there has been a change in the application of the Pipe Fitter title and this change did directly and necessarily require increased costs by political subdivisions, the appropriate remedy under the Hancock Amendment is not to enjoin the application of the Pipe Fitter title to pressurized pipe work, but, rather, to relieve public bodies of paying any such increased costs. The Occupational Title Rule will still apply independently to contractors and will still impose an independent duty on contractors to use the Pipe Fitter title when determining the required rate to pay their employees who engage in pressurized pipe work on public projects. Hancock is meant to protect public bodies, not private contractors.

In other words, while Hancock may relieve a public body of paying increased (but unfunded) costs due to a change in the application of occupational titles, it does not relieve a contractor of its duty under the Prevailing Wage Law to pay its workers in compliance with the changed occupational titles. The occupational titles still apply to the contractor and the contractor is not protected by the Hancock Amendment. Thus, the contractor is left in the peculiar position of having to pay any increase in labor costs that may result from a change in application of occupational titles, but not being able to pass those increased costs on to the public body. This is an absurd result and demonstrates that application of the Hancock Amendment to this case is untenable.

Summary. Even if all facts asserted by Plaintiffs in this case are accepted as true, there is no violation of the Hancock Amendment. The Department has not changed its application of the Occupational Title Rule. Even if it had, any change is not the kind of change that would trigger the application of the Hancock Amendment. The circuit court was, therefore, correct in concluding that the Department was entitled to judgment as a matter of law and to summary judgment on this issue. That conclusion should now be affirmed.

B. No Increase in the Level of Activities or Services Required of Political Subdivisions Because the Department has Not Changed Its Position

Undertaking an analysis as to whether a change in the application of occupational titles results in an unfunded mandate upon local public bodies in violation of the Hancock Amendment is necessary only if there has actually been a change in the application of those titles. But there has been no such change. Thus, Hancock's prohibition of unfunded mandates does not apply in this case at all.

Plaintiffs contend that prior to implementation of the Occupational Title Rule, the Department took the position that work performed on outdoor pressurized pipe projects fell within the occupational classification of General Laborer. Then, Plaintiffs continue, at some point after implementation of the Occupational Title Rule, the Department changed its position and began considering work performed on outdoor pressurized pipe projects to fall within the occupational title of Pipe Fitter. That is not, however, the case.

The Department's position, even prior to implementation of the Occupational Title Rule, has consistently been that the Prevailing Wage Law requires payment of the prevailing wage for the occupational title (or, previous to the Occupational Title Rule, the classification) of Pipe Fitter to workers who fabricate, install, or repair pressurized piping systems. LF 715 (affidavit of Colleen Baker)[4], 472-73 (Depo. pp. 48-50).

: In support of their assertion that the Department has changed its position as to the occupational title, or classification, of workers employed on outdoor pressurized pipe projects, Plaintiffs rely heavily on Essex Contracting, Inc. v. City of DeSoto, 815 S.W.2d 135 (Mo. App. E.D. 1991) (*"Essex II"*). Actually *Essex II*, a contractor challenged the Department's conclusion in 1986 that workers on its outdoor pipe project should have been paid the prevailing wage for

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[4]In the circuit court, Plaintiffs challenged the testimony of Colleen Baker, Director of the Division of Labor Standards, as contradictory. It was not. In the event Plaintiffs bring up the points raised in this regard in their Reply Brief, the Department asks this Court to refer to its reply to Plaintiffs' response to the Department's Motion for Summary Judgment, at pp. 3-4. LF 753-54.

the occupational classification of Pipe Fitter. 815 S.W.2d at 137. That Departmental position that workers on outdoor pipe projects should be paid at the prevailing wage rate for the occupational classification of Pipe Fitter is exactly the position of the Department now.

Plaintiffs, however, point to the circuit court's finding in *Essex II* ruled only that, based on the evidence presented, workers installing ductile iron pipe in Jefferson County in 1985 were properly paid the rate typically paid to Laborers at that time in Jefferson County. *Essex II* was, in essence, simply a determination that the only evidence in the case established that the wage rate typically paid to Laborers in Jefferson County set the prevailing wage rate for the occupational classification of Pipe Fitter in that county.

In a related point, Plaintiffs assert, at p. 30 of their Brief, that the "Department had 'no authority' prior to 1996 [when the Occupational Title Rule became effective] to require Pipe Fitter wages on Outdoor Pipe Projects 'from an enforcement standpoint based on *Essex II* decision as holding that the Department could not determine that work tasks on a particular project were work of a similar nature to particular work classifications until it established standards by which to reach such determinations. LF 473 (Depo. at 50). The Occupational Title Rule was intended to establish such standards. *Id.* *Lee Mechanical Contractors, Inc.*, 938 S.W.2d 269, 271 (Mo. banc 1997) (Occupational Title Rule promulgated to "describe the work of each type of worker, so that contractors could understand the law"). Even after developing these standards, the Department maintained its position that work on outdoor pipe projects

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[5]The Department agrees that ductile iron pipe can be pressurized pipe. LF 473 (Depo. at 49-50).

should be paid at the prevailing rate for the occupational title of Pipe Fitter. There has been no change in the Department's application of the Prevailing Wage Law that would trigger applicability of the Hancock Amendment.

Plaintiffs' affidavits do not establish change in Department's application of work classifications. Plaintiffs also vigorously assert that several affidavits they have provided (LF 100, 105-06, 203-04, 205-06, 207, 209, 211, 213) establish that contractors have predominantly and customarily used Laborers and paid the General Laborer wage rate on outdoor pipe projects. LF 100, 203-04, 205-06, 207, 209, 211, 213, 219, 222, 223-28. These affidavits, however, do not support the assertion.

The affidavits report only the viewpoint of a few individuals with experience with outdoor pipe projects. That experience itself is largely restricted to St. Louis and surrounding counties. But, even if the experience of these individuals were statewide, their personal points of view do not establish any predominant practice regarding payment of workers on outdoor pipe projects. The affiants state only practices known to them on particular projects known to them. The affiants do not set out any factual basis establishing that they have complete knowledge of such practices in the state at large or even in the counties they do have some knowledge of. They do not establish the reasoning or practices of all contractors. Neither does the one affidavit asserting that 85% of water and sewer projects of local governmental authorities have been constructed by members of a contracting association that uses Laborers for the non-mechanized work on these projects establish a customary practice of using Laborers on these projects. This figure does not take into account work performed on private water and sewer lines. Thus, the assertions in the affidavits are not adequately supported and the factual assertion in the affidavits are insufficient to establish a genuine issue of fact.

Plaintiffs charge that the Department must counter their affidavits with opposing affidavits or other factual material and that, in the absence of such countering material, their assertions of fact must be accepted. But a motion for summary judgment is properly granted when "there is no *genuine* issue as to any *material* fact and . . . the moving party is entitled to judgment as a matter of law." Mo.R.Civ.P. 74.04(c)(6) (emphasis added.) Thus, an assertion of fact may be rebutted on grounds of genuineness as well as of materiality. *See* ITT Commercial Fin. Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 382 (Mo. banc 1993) ("[a] 'genuine issue' is a dispute that is real, not merely argumentative, imaginary or frivolous.") The Department's challenge to Plaintiffs' affidavits, is to the former.

In any event, the assertions in Plaintiffs' affidavits that contractors have predominantly and customarily used Laborers and paid the General Laborer wage rate on outdoor pipe projects are immaterial to Plaintiffs' claims. Those assertions are not inconsistent with the Department's longstanding position that work on outdoor pipe projects is similar in character to the work within the occupational title (or, prior to the Occupational Title Rule, classification) of Pipe Fitter and that the applicable prevailing wage rate on such projects is that for the occupational title (or, formerly, classification) of Pipe Fitter. The Prevailing Wage Law permits any class of worker to perform any task. Essex Contracting, Inc. v. City of DeSoto, 775 S.W.2d 208, 213 (Mo. App. E.D. 1989) (*Essex I*). Even though the Department concludes that work on outdoor pipe projects is similar to the work within the occupational title of Pipe Fitter, contractors may use members of a Laborers' Union if they choose to. The significance of the Department's position is that, whatever class of worker is doing the work on the outdoor pipe project in a county, those workers must be paid the rate that prevails in that county for workers within the occupational title of Pipe Fitter. This requirement that workers on outdoor pipe projects be paid

the prevailing rate for the occupational title of Pipe Fitter does not mean that the rate customarily paid to Laborers may not be the appropriate rate for work on outdoor pipe projects in a county (which is the rate Plaintiffs' affiants contend is the rate customarily paid for such work in their counties). The rate customarily paid to Laborers in a county will be the rate that sets the prevailing rate for the occupational title of Pipe Fitter in that county if more hours of work that fall within the occupational title of Pipe Fitter are worked by Laborers than are worked by Pipe Fitters.

For example, suppose that members of Laborers' unions work 10,000 hours in a county performing work on outdoor pipe projects and other work falling within the occupational title of Pipe Fitter and that members of Pipe Fitters' unions work only 9,500 hours in that county performing work on outdoor pipe projects and other work falling within the occupational title of Pipe Fitter. Since more hours of the work within the title of Pipe Fitter are performed by Laborers in the county, the wage rate paid to Laborers will set prevailing rate for the occupational title of Pipe Fitter in that county. *See* . Plaintiffs also cite two decisions of the Labor and Industrial Relations Commission in support of their claim that contractors throughout Missouri have predominantly and customarily used Laborers and paid the General Laborer wage rate on outdoor pipe projects. Appellants' Brief at p. 11. These decisions, however, imply only that the Commission accepted as a fact that workers belonging to particular Laborers' union locals "have traditionally installed pressurized pipe" in particular counties. LF 219, 222. Even assuming that this implication is correct, a conclusion that members of Laborers' unions have a tradition of working on the installation of pressurized pipe does not mean that this is the *predominant* practice. Perhaps more tellingly, any craft, Laborer or not, could be the traditional group to install pressurized pipe but, as noted in both Commission decisions referred to, the work

of installing pressurized pipe would still be work of a similar character to the work of the occupational title of Pipe Fitter. LF 219, 222.

Even if the Commission decisions did support Plaintiffs' contention that contractors do predominantly use Laborers on outdoor pipe projects, such a fact would be immaterial to Plaintiffs' claims here for the same reasons discussed above with regard to similar contentions in Plaintiffs' affidavits.

Department's former descriptions of work included within the classification of Laborer are not evidence of a change in the Department's position. In support of their contention that the Department has changed its position with regard to which occupational title is applicable to work on outdoor pipe projects, Plaintiffs compare the Occupational Title Rule's definition of work falling within the occupational titles of Pipe Fitter and Laborer with the Department's former descriptions of work falling within the occupational classification of General Laborer - Heavy Construction (LF 255, 286, 316). Appellants' Brief, at p. 32. Under the Occupational Title Rule, the Pipe Fitter title "[a]pplies to workers who fabricate, install and repair piping systems [including] all pressurized piping systems." 8 C.S.R. 30-3.060(8)(T) (reproduced in Appendix to Brief of Appellants, at A-22). The Laborer title includes "work in connection with nonpressurized pipelines." 8 C.S.R. 30-3.060(8)(K)2.A (reproduced at A-19). Prior to the implementation of the Occupational Title Rule, Annual Wage Orders No. 1 and No. 2 defined the work of General Laborer - Heavy Construction to include "all work in connection with sewer, water, gasoline, oil, drainage pipe, conduit pipe, tile and duct lines and all other pipe lines." LF 255, 286.

These Annual Wage Orders also included a description of the work of Skilled Laborer - Heavy Construction. LF 255, 286, 712-13. The Department had also included comparable

descriptions for these two occupational classifications in its project specific wage determinations that it issued before it began issuing Annual Wage Orders. LF 316-18, 712-13. No description was given in either the Annual Wage Orders or the project specific wage orders of the work included within the occupational classification of Pipe Fitter. LF 713.

The descriptions of the tasks included within the occupational classifications of General Laborer - Heavy Construction and Skilled Laborer - Heavy Construction provided in the project specific wage determinations and in the Annual Wage Orders issued before implementation of the Occupational Title Rule were meant only to differentiate between different kinds of work done by different categories of Laborer, not to differentiate between the work of the classifications of Laborer and Pipe Fitter. LF 713.

Although perhaps not a model of clarity, as indicated by the purpose of the descriptions related to the classifications of Laborer, the meaning of the language "all work in connection with" the various kinds of pipe meant "all work *that would typically be done by a Laborer* performed in connection with" the various kinds of pipe. In other words, the work typically performed by a Laborer in connection with pipe projects came within the classification of General Laborer - Heavy Construction instead of within the classification of Skilled Laborer - Heavy Construction (or any other classification of Laborer for that matter). LF 713 (emphasis of affiant). Work typically done by a Laborer performed in connection with a pipe project, and that would be included within the classification of General Laborer - Heavy Construction, includes unloading the pipe by hand into a stockpile, digging a trench by hand, and filling the trench in by hand. LF 713-14. Thus, the description of the work of General Laborer - Heavy Construction was not intended to expand the work of the occupational classification of Laborer to include work related to the actual fabrication, installation, and repair of pressurized pipe. LF 714.

Plaintiffs' related assertion that at one time the Department distributed federal wage information that included descriptions of the work of General Laborer similar to that found in the Department's first two Annual Wage Orders, Appellants' Brief, at p. 32, is misleading. The Department may have provided federal material for the information of interested parties, but it was not included in any of the Department's wage determinations. LF 470 (Depo. at pp. 39-40), 715. To the extent there is any dispute of fact here, the dispute is immaterial. The federal descriptions of work are applicable to federal wage requirements (which would apply in addition to state prevailing wage requirements on projects receiving funding from both the state and federal governments), but they have nothing to do with the application of the Missouri Prevailing Wage Law by the Department. LF 470 (Depo. at pp. 39-40), 715.

Department correspondence and seminar comments are not evidence of a change in Department's position. Plaintiffs also seek support for their assertion of the occurrence of a change in the Department's application of the occupational title (or classification) of Pipe Fitter in a letter from a representative of a Pipe Fitters' Union to Colleen Baker, the Director of the Department's Division of Labor Standards. In this letter, the Union representative remarked that Jim Boeckman, the Assistant Director for the Wage and Hour Section of the Division of Labor Standards (LF 463), had indicated to him that the Division "would review and settle cases in a different manner in the future." Appendix to Brief of Appellants, at A-53. That statement, however, relates not to a question as to which occupational title the work of installing pressurized pipe falls within (Laborer or Pipe Fitter), but rather to the Union's concern that only time spent in the actual "joining" of pipe was paid at the rate for the occupational title of Pipe Fitter as opposed to time spent in all tasks related to the joining of the pipe. LF 487-88 (Depo. pp. 108-12). It has been the Department's consistent position that all tasks related to the joining

of pipe should be paid at the prevailing rate for the occupational title of Pipe Fitter. LF 488 (Depo. pp. 111-12).

Plaintiffs also cite letters from Colleen Baker to two state representatives as support for their contention that the Department has changed its application of occupational titles to outdoor pipe projects. Plaintiffs' Supplemental LF 33, 37. The letters referred to, however, merely state what has been discussed already, i.e., that the Annual Wage Orders used to have a definition of Laborer stating that the work of Laborer included "all work in connection with" various kinds of pipe and that, after its promulgation, the Occupational Title Rule explicitly addressed which classification that work on pressurized pipe would come under. Plaintiffs' Supplemental LF 33, 37. As noted above, the description of the work of Laborer in the Annual Wage Order was meant only to differentiate between different kinds of work done by different categories of Laborer, not to differentiate between the work of the classifications Laborer and Pipe Fitter. LF 713-14.

Plaintiffs also reference comments made by Colleen Baker at a seminar in Wentzville, Missouri, in August 1995. According to Plaintiffs, Ms. Baker stated that the Department would not interpret or apply the Occupational Title Rule to require payment of the prevailing wage of the occupational title of Pipe Fitter for all work in connection with the installation of pressurized pipe, but would rather only require the payment of the Pipe Fitter prevailing wage for the limited amount of time workers spent actually joining the pipe. LF 204, 384-85. Ms. Baker did speak at that seminar, but she did not state, either in formal remarks or in informal discussions, that the Division would require payment of the prevailing wage for the occupational title of Pipe Fitter only for the limited amount of time that the workers spent actually joining the pipe. LF 715.

The notes from that seminar made by Richard B. Pikey themselves state, in relevant part, only that "Pressure Pipe (Sewers, Water Mains, Etc.) - Joining Of Pipe Should Be Paid Pipe Fitter Wages." LF 386. That is an accurate statement (as long as it is understood that "Pipe Fitter Wages" means the wage determined as prevailing for the occupational title of Pipe Fitter) and a statement that does not imply that other tasks related to the joining of the pipe are not also entitled to receive the prevailing wage for the occupational title of Pipe Fitter.

Summary. The Department's position as to what work comes within which occupational title (or occupational classification) has been consistent. Because it has not changed its position, it has not required political subdivisions to increase the level of any of their activities or services. Therefore, the Hancock Amendment taxpayer protections do not apply here at all. The Department was entitled to judgment as a matter of law and, hence, to summary judgment on this issue.

ARGUMENT II

The Department's application of the occupational title of Pipe Fitter to the work of installing outdoor pressurized pipe is authorized by the Prevailing Wage Law and does not disregard actual wage rates paid for work in a locality. [Response to Appellants' Second Point.]

The Department Has the Authority to Establish Occupational Titles of Work. As set out above, the basic mandate of the Prevailing Wage Law is that "[n]ot less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed . . . shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works." § *State v. Lee Mechanical Contractors, Inc.*, 938 S.W.2d 269

(Mo. banc 1997)290.240.2*Associated Gen. Contractors v. Department of Labor and Indus. Rels.*, 898 S.W.2d 587 (Mo. App. 1995). The court there found that this regulation allowed "the Department to improve its enforcement of the [Prevailing Wage Law] by reducing or totally eliminating disputes about how work is classified," and held that the regulation was a proper exercise of administrative authority. *Id.* at 591, 595. The Occupational Title Rule "simply standardizes the descriptions of the types of work typically performed on public works projects throughout the state." Heavy Constructors Ass'n v. Division of Labor Standards, 993 S.W.2d 569, 573 (Mo. App. 1999).

Placement of Work on Pressurized Pipe within the Occupational Title of Pipe Fitter Is Appropriate. To the extent that Plaintiffs' challenge here is to the Department's placement of

work on pressurized pipe lines within the occupational title of Pipe Fitter, it must fail. Following the decisions in *Heavy Constructors*, it should be beyond dispute that the Department has the authority to determine what work is similar to other work. The Department's placement of work on pressurized pipe lines within the occupational title of Pipe Fitter is only a specific application of that authority.

The placement of pressurized pipe work within the Pipe Fitter title is also a reasonable application of the Department's authority. Work on pressurized piping systems is not similar to the work on nonpressurized systems. There are differences in the tools, tasks, and techniques involved. LF 714.

Plaintiffs themselves have provided two opinions of the Labor and Industrial Commission from cases in which objectors to prevailing wage determinations of the Department argued that the occupational title of Laborer should include "work in connection with pressurized pipe beyond the first Y, T or connection located outside a building in connection with sewage, gas and water distribution." LF 215, 220. Essentially the objectors were asking for what Plaintiffs want here: inclusion of outdoor work on pressurized pipe in the Laborer occupational title.

In these cases the Commission found that the tools, tasks, and techniques involved in installing a pressurized piping system are different from those involved in a non-pressurized system. LF 219, 222. In one case the Commission specifically noted that installation of pressurized piping systems requires more skill than the installation of non-pressurized systems and that these skills were more like those described in the Pipe Fitter title. LF 221. In both cases the Commission declined to add work on pressurized piping systems to the Laborer title and left that work in the Pipe Fitter title. LF 219, 222. The Commission reached these conclusions

despite apparently undisputed evidence that "workers within the jurisdiction of a Laborers' union have traditionally installed pressurized pipe" in the counties subject to the objections. LF 219, 222 (Commission did not use word "traditionally" in the second opinion). This evidence that members of a Laborers' union traditionally installed pressurized pipe, however, did not establish that "such work is work of a similar character to other items within the occupational title of laborer." LF 219, 222. These opinions establish that the Department's inclusion of pressurized pipe work in the Pipe Fitter occupational title is not an unreasonable exercise of its rulemaking authority.

Plaintiffs assert that the Department's judgment (supported by the Commission) that work on pressurized pipe should be classified within a different occupational title than work on nonpressurized pipe "[i]gnor[es] . . . how the marketplace has always classified Outdoor Pipe Project work." Appellants' Brief, at p. 50. Plaintiffs repeatedly emphasize their position that work performed on outdoor pipe projects in the counties at issue here has historically been done by members of Laborers' unions at wage rates typically paid to members of Laborers' unions. Contrary to Plaintiffs' view, however, local work practices are not determinative of what work is similar to other work, and therefore of which occupational title particular tasks fall within.

The nature of the work does not change based on what type of worker does it, or, to put it another way, what work is similar in character to other work is an issue independent of who does the work. It does not matter whether a member of a Laborers' union or a member of a Pipe Fitters' union (or a member of no union at all) does work on a pressurized piping system. The work is still similar in character to the other work set out in the occupational title of Pipe Fitter. The divergent work practices of the local marketplace do not alter what work is similar in character to other work. As noted by the court in *AGC*, 898 S.W.2d at 591 ("The type of work

reflected in each occupational title is the same no matter where it is performed"). The contractors in a county could customarily employ members of a bricklayers' union to install electrical conduit, but that work is still similar in character to the work set out in the occupational title of Electrician and not the work set out in the occupational title of Bricklayer.

The value of occupational work descriptions that apply equally to the state as a whole and do not vary based on local work practices is readily apparent. The Prevailing Wage Law applies to the whole state. Therefore, it is important to all who must follow the Law to know what wage rates must be paid to which workers. A regulation of statewide application that carefully explains which workers perform which types of work fulfills this role, whereas reliance on historical practices in only particular areas of the state would lead to confusion and, likely, unwitting violations of the Law. Reliance on area historical practices would also undermine the Prevailing Wage Law goal of all statewide contractors operating on a level playing field. For example, if occupational titles varied from county to county, contractors that normally work in one area of the state under one set of occupational titles might easily fail to realize that the titles applied differently in another area and either underbid or overbid its competitors in that area due solely to its misunderstanding of the applicable occupational titles. The variance in titles can either lead the contractor into accidentally violating the law by underpaying the actual applicable prevailing wage to its workers or cause it a competitive disadvantage because it does not realize that a lower prevailing wage applies in the area.

Considering the Department's authority to determine the classification of different types of construction work and given the disadvantages of use of area historical practices, Plaintiffs' denigration of the use of "logic or reasonableness" in determining which work falls within which occupational title, Appellants' Brief, at p. 49, is unfounded. This is also why evidence offered

by Plaintiffs as to area historical practices is really immaterial to the outcome of this case. The appropriate prevailing wages may be determined without regard to area historical practices. *City of Joplin v. Industrial Comm'n*, 329 S.W.2d 687, 694-95 (Mo. banc 1959), cited in Appellants' Brief, at pp. 50-51, is not contrary to the Department's Occupational Title Rule and its application in this case. In that case, the Court affirmed the trial court's conclusion that the Commission had not considered all relevant factors in determining the prevailing wages to be paid on a sewer project because it considered only rates of pay for heavy construction work despite evidence that sewer work in the area was actually done by "a different type of workman" and "that such workmen operate different types of equipment, lay tile, drive trucks and do other work." *Id.* at 694. The Court also instructed the Commission to consider on remand "any work in heavy construction that could reasonably be found to be similar" to the work to be performed on the sewer project. *Id.* at 695. Taking into account work tasks that are similar, the different types of equipment used, and the actual activities of workers on construction projects is exactly what the Department has done in its work descriptions in the Occupational Title Rule, including those for Laborer and Pipe Fitter. LF 219, 222, 714. *See also AGC*, the 898 S.W.2d at 592*Heavy Constructors*, 993 S.W.2d at 573. The Department has taken into account the actual equipment used and work performed on outdoor pipe projects in defining the work of Laborer and Pipe Fitter as required by 8 C.S.R. 30-3.040(1). Contrary to Plaintiffs' argument, Appellants' Brief, at pp. 46-49, a statewide application of the Occupational Title Rule does not undermine the requirement that the prevailing wage in a locality be based on the market rate of wages actually paid in that locality. The Department determines prevailing wages based on information it receives about the wage rates paid for the various occupational titles in a county.

The wage rate paid most frequently for an occupational title as shown in the information submitted to the Department will become the prevailing wage for that occupational title in that county. *Heavy Constructors*, 993 S.W.2d at 573.

The ". Plaintiffs also seek support from the *Essex* cases. *Essex Contracting, Inc. v. City of DeSoto*, 815 S.W.2d 135 (Mo. App. E.D. 1991) ("*Essex II*"). Plaintiffs argue that the meaning of the *Essex* cases is that the Department has no statutory authority "to impose Pipe Fitter wages" for work on outdoor pipe projects where that is contrary to existing local practices. Appellants' Brief, at p. 56. Plaintiffs, however, misread the *Essex* cases. Those cases state only that "[a] contractor has no express statutory obligation to hire a particular type or class of employee to perform particular tasks." 815 S.W.2d at 139*Essex II* adds that [n]owhere in the statute is authority vested in [the Department] to determine which type of workman will be required to perform a particular task on a public works project." 8 C.S.R. 30-3.060(1) ("The description of work designated for a particular occupational title is not intended to be jurisdictional in scope or nature, and is not to be construed as limiting or prohibiting workers from engaging in construction work falling within several occupational titles."). What is relevant to the Department is proper classification of various construction tasks into proper occupational titles drawing together work of a similar character. *See* 8 C.S.R. 30-3.060(2) ("Each occupational title of work description shall be based upon the particular nature of the work performed, with consideration given to those trades, occupations or work generally considered within the construction industry as constituting a distinct classification of work."). And, as recognized in the *AGC*, does have statutory authority to classify work by collecting work tasks of a similar character together into general occupational titles. The Department also has the authority under

§ 290.262.1 to determine the prevailing wage in each locality "for each separate occupational title." And the Prevailing Wage Law itself requires contractors to pay their workers on public construction projects at least the prevailing rate of wages as determined by the Department for the type of work these workers are doing. § *Essex II* did affirm the trial court's finding that Laborers in Jefferson County employed on public construction projects customarily installed ductile iron pipe and its conclusion that payment of the wage rate typically paid to Laborers was the proper wage to be paid for such work. 815 S.W.2d at 138-39. That affirmance, however, was based on the evidence presented at trial as to the wages paid for work on pressurized pipe in that county up to that time. It does not appear that evidence of wages paid for any other tasks was presented. *See Essex* simply based its decision on the limited evidence available to it. As noted in Argument I, the decision in **:** The actual crux of Plaintiffs' (and of Amici's) argument seems to be that placement of work on pressurized pipe lines within the Pipe Fitter title will necessarily result in the prevailing wage for that work being determined to be the Pipe Fitters' union rate and never to be the wage typically paid to Laborers. Plaintiffs contend that the Department thereby directs that work on pressurized pipe lines be paid at the Pipe Fitters' union rate despite the local custom of paying the wage typically paid to Laborers for that work. But that is not true. The placement of tasks within a particular occupational title is not determinative of the wage found to be prevailing. The determinative factor is the actual wages paid in a county for those particular tasks.

The Department sets rates in each county for each of its occupational titles based on wage information submitted to it based on the work classifications set out in the Occupational Title Rule. If work identified under the occupational title of Pipe Fitter is done by a member of a Laborers' union, it is still to be submitted to the Division as a wage paid for the occupational title

of Pipe Fitter. If, as Plaintiffs (and Amici) contend, members of Laborers' unions do all or most of the work in a county within the occupational title of Pipe Fitter (including work on pressurized pipe lines), the rate paid to those workers (if reported to the Department) will set the prevailing rate for the occupational title of Pipe Fitter. The concern that the prevailing wage will be set artificially high is laid to rest because prevailing wages are based on those most commonly paid in the locality.[6]

In short, the Department does not require that the wage rate established by a Pipe Fitters' union be the prevailing wage rate for the occupational title of Pipe Fitter. The Department is not concerned with who does particular work, but only with what work is done and how much is paid for it. *See* 8 C.S.R. 30-3.060(1). Plaintiffs' goal here seems to be to pull the tasks involved in the installation of pressurized pipe systems completely out of the occupational title of Pipe Fitter and to have a separate prevailing wage rate be set for the pressurized pipe work. Such fragmentation of tasks within one occupational title, with separate prevailing wage rates set for each, is not required by the Prevailing Wage Law. *See* 290.230.1 (emphasis added). By its

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[6]Plaintiffs' (and Amici's) contention that most or all work on outdoor pipe projects is done by Laborers at significantly lower wages than paid to Pipe Fitters in a county is not consistent with a prevailing wage for the occupational title of Pipe Fitter in that county that is higher than the rate paid to those Laborers who are performing the work on such projects. If all that work on outdoor pipe projects is being done at a Laborers' rate, then that rate, if reported to the Department, should set the prevailing rate for the occupational title of Pipe Fitter.

adoption of the Occupational Title Rule the Department has determined which work is of a similar character and then, as required by the Law, it determines the prevailing wage in each county for each of these groupings of similar work.

If work on pressurized pipe can be separated from the other tasks set out in the Pipe Fitter occupational title for establishment of its own prevailing wage due to local work practices, then any other task in any other occupational title would also be subject to such separation and separate prevailing wage. Potentially, the prevailing wage would need to be set for every component of every type of work. Such a result would be completely unworkable. There are tens of thousands of individual tasks set out in the Occupational Title Regulation as a whole. *See* : The Department has the authority to determine what work is similar in character to other work and has appropriately done so in the Occupational Title Rule. *Heavy Constructors*, 993 S.W.2d at 573. The Department has specifically and reasonably concluded that the work involved in installing pressurized piping systems is similar in character to other work grouped into the occupational title of Pipe Fitter. LF 219, 222, 714. The Department has authority to determine the prevailing wage in each county for each separate occupational title. §

The Occupational Title Rule Is Unambiguous and the Department Interprets It Exactly as It Is Written. [Response to Appellants' Third Point.]

Pipe work within the occupational title of General Laborer explicitly includes only "work in connection with *nonpressurized* pipelines, such as *nonpressured* sewer, water, gas, gasoline, oil, drainage, pipe, conduit pipe, tile and duct lines and other *nonpressurized* pipelines." 8 C.S.R. 30-3.060(T). (Emphasis added.)

This set of definitions plainly and without any confusion as to the drafters' intent establishes a strictly dichotomous scheme under which work on nonpressurized piping systems is

to be paid at least the prevailing wage for the occupational title of General Laborer while work relating to pressurized piping systems is to be paid at least the prevailing wage for the occupational title of Pipe Fitter. The drafters' failure to consider at the time they drafted the regulation whether or not there are nonpressurized gas, gasoline, and oil piping systems does not rebut this plain intent of the Occupational Title Regulation.[7] "Unambiguous provisions in regulations must be given their plain meaning." Whiteman v. Del-Jen Constr., Inc., 37 S.W.3d 823, 829 (Mo. App. 2001).

On the other hand, perhaps the drafters did realize that there are currently no nonpressurized gas, gasoline, and oil piping systems, but, understanding that technology changes and that such systems could be developed, thought it appropriate to include a place for such systems in the Rule.

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[7]Plaintiffs' characterization of the drafters' failure to realize that gas, gasoline, and oil piping systems are always pressurized as "incompetence!" seems unduly harsh. The Occupational Title Rule after all includes descriptions of 26 occupational titles, including numerous subtitles, covering the full gamut of construction work and fills nearly 10 closely packed pages in the Code of State Regulations. *See* Appellants' Appendix, at pp. A-14 to A-24. The drafting of this regulation was a monumental undertaking calling for respect for the knowledge and perseverance necessary to the completion of the regulation (as well as for the audacity of taking on the task to start with) instead of denigration because the regulation does not meet some personal standard of perfection.

Even if the Occupational Title Rule was ambiguous with respect to the proper occupational titles to be applied to work on pressurized versus nonpressurized piping systems, the purpose of using rules of statutory (or in this case, regulatory) construction is to determine the intent of the drafters. Here, we know the intent of the drafters.

Plaintiffs' reliance on *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 85 (Mo. banc 1993), is misplaced. In that case, this Court found that the Director's interpretation of a statute was contrary to its plain import. *Id.* In contrast, the Department's application of the Occupational Title Rule in this case is consistent with the Rule's plain language. Further, the Department is interpreting one of its own regulations here, not a statute. When interpretation of an agency's own rule is at issue, a court is to give deference to the agency's determination. Willard v. Red Lobster, 926 S.W.2d 550, 553 (Mo. App. 1996). Such deference should be applied here.

Additionally, a regulation is valid unless it is unreasonable or plainly inconsistent with the statute under which it was promulgated. Linton v. Missouri Veterinary Med. Bd., 988 S.W.2d 513, 517 (Mo. banc 1999). "A regulation is not unreasonable merely because of a subjective feeling that the regulation is arbitrary or unduly burdensome." *Id.* The mention of nonpressurized gas, gasoline, and oil piping systems in the Occupational Title Rule renders it neither unreasonable nor inconsistent with the Prevailing Wage Law.

The Department is applying the Occupational Title Rule according to its plain language. There is no ambiguity. Therefore the Department was entitled to judgment as a matter of law and the circuit court appropriately granted summary judgment in favor of the Department on this issue.

CONCLUSION

For the foregoing reasons, the Department urges this Court to affirm the judgment of the St. Charles County Circuit Court entered in its favor.

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CERTIFICATE OF SERVICE

AND OF COMPLIANCE WITH RULE 84.06(b) AND (c) and LOCAL RULE 360

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, this 22nd day of March, 2004, to:

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I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 14,304 words, excluding the Table of Contents and the Table of Authorities.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses, and is virus-free.

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